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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-eighth session

SUMMARY RECORD (PARTIAL)* OF THE 575th MEETING

Held at the Vienna International Centre, Vienna,
on Monday, 22 May 1995, at 9.30 a.m.

**Chairman**: Mr. GOH (Singapore)

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* No summary record was prepared for the first part of the meeting.

This record is subject to correction.

Corrections should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent *within one week of the date of distribution of this document* to the Secretary of the Commission, room E0455, Vienna International Centre.

Any corrections to the records of the meetings of this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

V.95 59140 (E) (a\1995\uncitral 2)

Distr.: 24 November 1995

*The discussion covered in the summary record began at 9.50 a.m.*

**INTERNATIONAL COMMERCIAL ARBITRATION: DRAFT NOTES ON ORGANIZING ARBITRAL PROCEEDINGS** (*continued*) (A/CN.9/396 and Add.1, A/CN.9/410)

1. **The CHAIRMAN** invited the Commission to resume its consideration of the draft Notes on Organizing Arbitral Proceedings (A/CN.9/410, annex).

**Section 6**

2. **Mr. HOLTZMANN** (United States of America) said that his delegation welcomed the addition in the current draft Notes of a section on confidentiality. It was a subject that was receiving increasing attention among arbitration institutions and in court rulings, and was expected to undergo changes and developments over the coming years, particularly in the areas covered by paragraphs 29 to 31. He accordingly felt that those paragraphs should be reworded to state that parties might wish in appropriate cases to consider entering into agreements relating to confidentiality. He proposed that the revised text should indicate that such agreements might include one or more of the following aspects: identifying what material should be kept confidential; establishing measures to maintain confidentiality of that material and of hearings; clarifying whether the existence of the arbitration or the award should be kept confidential; determining whether any special procedures should be employed to maintain confidentiality of information transmitted by electronic means; and specifying the circumstances in which confidential material might be disclosed, such as cases where such disclosure was required by law or where information came within the public domain. In the Secretariat's redrafting of the text, it would be preferable to avoid recommending that all those aspects be included; the choice should be left to the discretion of the parties and arbitrators.

3. **Mr. FOUCHARD** (France) said that he agreed in part with the analysis given by the representative of the United States of America, but not at all with the conclusions he drew from it. Although confidentiality was a new and changing area of attention, he did not feel that the Notes should recommend that an agreement be concluded on the subject. That would be difficult to negotiate and would also encumber the procedure and increase the cost. Paragraph 28 should merely state that, since confidentiality was one of the essential advantages of arbitration, the arbitral tribunal had a duty to recall the principle of confidentiality, seek to ensure that it was respected and draw the parties' attention to their obligations in the matter. In his view, paragraphs 29 to 31 were too technical and should be deleted.

4. **Ms. ZHANG Yuejiao** (China) agreed that some redrafting of the text was necessary. Confidentiality had considerable applications and implications. In her view, paragraphs 29 to 31 could be simplified. The Notes could state that confidentiality was an important factor in the transmittal of information by electronic means and by means of documents, and that parties should take particular care in their use. In cases where arbitration institutions did not have their own rules, the question of confidentiality should be based on agreements made between the parties, failing which the arbitral tribunal would be able to make its own arrangements.

5. **Mr. GRIFFITH** (Australia) said that his delegation considered it important for the Notes to make it clear that parties should not assume that obligations of confidentiality existed. He would suggest that the text might mention that the arbitral tribunal could inquire as to what undertakings it should give the parties and what undertakings the parties might wish to give each other with regard to confidentiality. It would be preferable for the arbitral tribunal and the parties to clarify the matter at the preliminary stage of the arbitration by an agreement in principle rather than deal with a particular issue of confidentiality if it arose in the course of the proceedings.

6. **Mr. BURMAN** (United States of America) felt that paragraph 29, as currently worded, might inadvertently give the impression that communications by electronic means were suspect and could be unsafe. On the contrary, if properly used, computer-based transmissions were much safer than traditional methods of communication. The actual inclusion of such a topic in the Notes was open to question, since it was geared not to the issue of confidentiality, but to particular methods of communication. It would be better to delete the paragraph. If, however, it was retained, it should avoid making any implication about the safety of communication. His comments would also apply to paragraph 33.

7. **Mr. OLIVENCIA** (Spain) said that his delegation felt that paragraph 28, which merely stated that it might be useful for the arbitral tribunal to record parties' agreements on confidentiality, was possibly insufficient in that the role of the arbitral tribunal was not necessarily one of a passive recorder of an agreement of the parties. Arbitrations were not public, but private proceedings, a fact that offered certain advantages. There would be no problem if parties reached agreements on confidentiality and the arbitral tribunal recorded them, with the parties assuming responsibility for them. It might, however, prove difficult for the arbitral tribunal to take decisions at the outset on confidentiality of the arbitration, although it could draw attention to the principle of confidentiality and its scope.

8. It was also important to point out in the Notes that the arbitral tribunal itself had a duty of confidentiality in its conduct of the proceedings. In cases that attracted public interest, arbitrators were often approached by the media seeking details of the course of the proceedings. Moreover, agreements reached by the parties before the appointment of the arbitrators were also binding on the arbitrators. In his view, the text should be redrafted in order to deal with those additional aspects.

9. **Mr. ABASCAL ZAMORA** (Mexico) said that his delegation was of the opinion that paragraph 29 was appropriately drafted. The only two electronic means of communication it referred to, telefax and electronic mail, did not at present provide parties with much security in the matter of confidentiality and could easily be intercepted by third parties.

10. **Mr. CHOUKRI SBAI** (Observer for Morocco) said that arbitration differed from the standard judicial process in that the parties played an important role in arbitral proceedings and in deciding on the manner in which they were conducted. Confidentiality was thus essential: the parties had vital interests and did not wish to disclose the nature of those interests. His delegation accordingly felt that it would be useful if the paragraphs on confidentiality mentioned agreements between the parties and the importance of adopting measures to ensure confidentiality. Those points were in addition to the role of the arbitral tribunal.

11. **Mr. SZURSKI** (Poland) said that confidentiality was one of the most attractive advantages of arbitration, and that his delegation therefore welcomed the inclusion of a reference to it in the Notes. In its view, paragraphs 28 to 31 were not at variance with current arbitration practice world-wide; they should accordingly remain as they stood, or possibly incorporate the changes proposed by the representative of France.

12. **Mr. SIKIRIC** (Observer for Croatia) agreed with the representative of Spain that the Notes should mention that principles agreed upon by the parties regarding confidentiality should also be binding on the arbitrators, since they enjoyed the parties' trust.

**Section 7**

13. **Mr. SZURSKI** (Poland), referring to the second sentence of paragraph 32, said that it was rare for the parties, when corresponding with each another, to send copies to the arbitrators. The last seven words of that sentence should therefore be deleted. Since the arbitrators were responsible for directing the proceedings, correspondence in principle took place between them and the parties.

14. The Notes might usefully refer to a problem sometimes encountered in connection with the exchange of writings, in both administered and ad hoc arbitrations, whereby one party, usually the respondent, in an attempt to avoid arbitration refused to acknowledge receipt or to take delivery of communications from the arbitral tribunal. Paragraph 32 might accordingly mention that in certain situations, after the other party had received the request for arbitration and whether or not it had appointed an arbitrator, it would be possible for the applicant's arbitrator to give notice at the outset that writings would be sent directly by the arbitral tribunal and be treated as received regardless of whether there was confirmation of receipt or not, except in the event of a change of address.

15. **Mr. HOLTZMANN** (United States of America) agreed the section should be redrafted, as it covered only documents exchanged between the parties. It should be expanded to include communications between a party and the arbitral tribunal and vice versa. The redrafted text should also make it clear that the examples given in paragraph 32 were not the only possibilities.

16. **Mr. OLIVENCIA** (Spain) agreed with the previous speaker. The present text did not exhaust all the possibilities, or even deal with those possibilities which occurred most frequently, but it should do so. The most frequently occurring possibilities were not those in which the parties directly exchanged their writings and sent copies to the arbitrators; rather, it was more usual for the copies to be sent to the arbitral tribunal, and for the original to be submitted to the tribunal as well. That did not exclude the possibility that copies could be exchanged directly between the parties, or that the appropriate number of copies could be submitted to the tribunal for transmittal to all the parties. What was important was to establish the means of communication, the persons responsible for making any communications from the tribunal to the parties, and the recipients of such communications and their addresses.

17. **Mr. MELIS** (Observer for the International Council for Commercial Arbitration) agreed it should be made very clear that the examples in the text were only examples and that there were other possibilities. In addition, the second part of the first sentence was not strong enough; it was essential for all arbitral tribunals to make it clear from the very start of the proceedings how documents and writings would be routed.

18. **Mr. SEKOLEC** (Secretariat) asked whether the Commission wished the Notes to deal with the situations described by the representative of Poland, where parties attempted to use dilatory tactics or were passive. If so, he wondered if a general reference should be included and whether, in terms of what to do in such situations, the Notes should follow approximately the wording of article 2, paragraph (1) of the UNCITRAL Arbitration Rules.

19. **Mr. HOLTZMANN** (United States of America) said that his delegation might welcome wording along the lines suggested by the representative of Poland. He agreed with the Secretariat that the appropriate approach was to follow the spirit, if not necessarily the exact wording, of article 2 (1) in the UNCITRAL Rules.

20. **Mr. MELIS** (Observer for the International Council for Commercial Arbitration) said that the problem raised by the representative of Poland was a real one, but that he would prefer to leave the text as it stood, because to add anything might open up endless further possibilities of amendment.

21. **Mr. FOUCHARD** (France) agreed with the previous speaker. The Commission was not at present establishing arbitration rules and would face even greater difficulties if it began drafting formulations of the kind contained in the UNCITRAL Rules. It was not the purpose of the Notes to provide solutions, but simply to draw attention to the problems posed by systematic refusal to receive writings.

22. **Mr. SEKOLEC** (Secretariat) said that, in that case, the Secretariat would simply draft a remark to the effect that arbitrators should be careful to keep all return slips for international postal receipts.

23. **Ms. ZHANG Yuejiao** (China) said that the first sentence of paragraph 32 should be rewritten to state that, in general practice, parties transmitted copies to the arbitral tribunal, which forwarded them as appropriate, but that in certain cases it was also possible for the parties to exchange writings directly. The Commission should avoid wording which suggested that a party could refuse to accept a communication. It should also be emphasized that, whereas pre-established procedures existed for handling writings in administrative tribunals, major problems arose when it came to ad hoc arbitration procedures.

**Section 8**

24. **Mr. CHOUKRI SBAI** (Observer for Morocco) said that the last sentence of paragraph 34 should be deleted, as it might be inconsistent with the draft Model Law on Electronic Data Interchange (A/CN.9/406), article 5 of which gave a data message the same value as a writing, and article 8 of which granted the admissibility and evidential value of data messages. As electronic communications were the field of the future, the sentence was superfluous.

25. **Mr. BURMAN** (United States of America) said that his delegation's comments on paragraph 29 applied equally to paragraph 33, as they were based in part on the developing interrelationship of computerized means of communication, in which telefax was being used increasingly simply as a receipt and printing mechanism for computer transmissions.

26. **Mr. LEBEDEV** (Russian Federation) said that, as his delegation understood them, paragraphs 34 and 35 concerned only those cases where the parties had agreed that documents would be provided not in paper-based form but through electronic means. It was only when there was such an agreement that any question would arise as to the use of such methods and that, regardless of whatever agreement there might be between the parties, the arbitral tribunal might recognize that documents must none the less be provided in paper-based form. No provision was being made for the arbitral institution to take an initiative whereby documents would have to be provided not in paper-based form but by electronic means. The use of such means depended on the technical capabilities of both the parties and the arbitrators in different countries.

27. **Mr. GRIFFITH** (Australia) said that paragraph 33 seemed somewhat old-fashioned and discouraging, as telefax was now an accepted part of life. Rather, language might be used to the effect that "it may be considered whether confirmation of some telefax documents should be required".

28. **Mr. ABASCAL ZAMORA** (Mexico) said that, with regard to paragraphs 34 and 36, time differences should be taken into account when electronic means were used. For example, when there was a time-limit for submitting a writing, the calendar day might be different for sender and recipient. Or, where both parties were required to submit writings at the same time, a party in an earlier time zone would have to send its writing earlier, and the party in the later time zone would have the advantage of being able to study it before submitting its own. Consideration should also be given to the need for acknowledgments of receipt for electronic communications. That was a very common practice, but it had to be established what the effect was of an acknowledgment or lack of acknowledgment. For example, in cases where a writing had not been received or there was no acknowledgment of receipt by one party, it was necessary to know whether to send another electronic communication or to send the document in writing.

29. **Mr. BONELL** (Italy) agreed that paragraph 33 was somewhat old-fashioned and perhaps rather exaggerated in stressing the possible shortcomings of communication via telefax. He had some concerns about the last sentence. It was reasonable to envisage that the parties and/or the arbitrator might "decide that certain types of documents should not be sent by telefax". But it hardly then seemed appropriate to suggest that the arbitral tribunal might nevertheless retain discretion to treat a document so sent as received, or even not to inform the other party.

30. Clearer language would also be advisable in paragraph 35. If the arbitral tribunal was not technically equipped for electronic communication, it would be unable to receive documents in that form, and therefore an agreement between the parties to adopt that means would no longer be relevant.

31. **Mr. SEKOLEC** (Secretariat), explaining the intention of paragraphs 34 and 35, said that, in order to facilitate the practical arrangements, parties often wished to exchange certain types of documents in electronic form, sometimes in addition to paper, sometimes not. Some arbitrators might also wish to have copies of electronic messages. The scope of the paragraphs was much more limited than it might appear, namely, to facilitate the typing of such messages, which might not be as easy to do with the paper-based form.

32. **Mr. LEBEDEV** (Russian Federation) said that paragraph 34 seemed to concern an agreement between the parties as to the use of electronic means only for communication between themselves, and not in the context of the arbitration. If so, they hardly needed guidance from the Notes. If, however, the paragraph concerned an exchange of documents between the parties in the context of the arbitration, the problem of ensuring that the tribunal received copies would arise.

33. **Mr. MELIS** (Observer for the International Council for Commercial Arbitration) said that, like previous speakers, he was not happy with the wording of paragraph 33. Telefax had become a fact of life in international arbitration. There was no problem with a mutilated communication, because in such a case the parties or arbitrators receiving the communication would ask for a new one. Accordingly, he would favour reversing the order of the text, giving the priority to telefax and then perhaps allowing the arbitrators or parties to establish which other communications should be sent in paper-based form, to avoid being flooded with the double forms of communication via telefax and hard copy.

34. As to the point raised by the representative of Italy on paragraph 35, it was perhaps a matter of language. There might be an agreement between the parties, on the one hand, and then a different decision by the arbitrators, on the other. But the essential problem was that there might be a technology gap between the tribunal and the parties which would have to be bridged.

35. **Ms. ZHANG Yuejiao** (China) said that, in paragraph 33, the phrase "should not be sent by telefax" should be rewritten. When confidentiality was an issue in the sending of telefaxes, the parties concerned should take measures to ensure such confidentiality, either by not using telefax or by encrypting their messages; that did not mean, however, that their confidentiality would not be maintained by using telefax.

36. Paragraph 35 should emphasize the fact that an arbitral tribunal could receive documents both through electronic means and in paper-based form. If it could accept both, it should establish which was the controlling one. In paragraph 36, concerning the procedures to be followed when a message was lost or the communication system otherwise failed, language should be added to the effect that parties and tribunals should reach agreement with the other parties, when adopting such measures, as perhaps the costs of arbitration would be increased.

37. **Mr. BURMAN** (United States of America) said that it might be better to condense paragraphs 34-36 into a couple of sentences and not focus on the detail of the methods of communication, as those methods were not an integral part of arbitration and were not especially necessary in a document dealing with issues involving international commercial arbitration.

**Section 9**

38. **Mr. HOLTZMANN** (United States of America), referring to the title of the section, said that parties wanted to know if one or more exchanges of documents would be permitted. In his view, a more general title such as "Arrangements for written submissions" might be preferable. In regard to the third sentence of paragraph 37, the present formulation seemed to be weighted against the idea of organizing procedures. The sentence should be redrafted to reflect the fact that while some tribunals might prefer to leave the extent and timing of the various exchanges to be decided in the light of developments, others might wish, at an early stage in the proceedings, to determine the number of exchanges of written submissions permitted and then to schedule the first exchange.

39. **Mr. SZURSKI** (Poland) expressed his agreement with the representative of the United States, but felt that the term "exchange" would be more objective than "arrangements".

40. **Mr. HOLTZMANN** (United States of America) said that the word "exchange" was not entirely satisfactory, since the submissions concerned were not always exchanges. In some cases, the tribunal might ask one party to make a written submission in order to explain a particular point.

41. **Mr. FOUCHARD** (France) said that the title should simply be "Written communications", which would cover every case. On other points he agreed with the representative of the United States, though the latter's suggestion was somewhat novel and designed to satisfy countries in which the exchange of writings was essential. Though he had some misgivings, he could accept the formulation.

42. **Mr. OLIVENCIA** (Spain) said that the word "timing" in the title of section 9 underlined the great importance of the chronological factor. It was not just a question of dates, but of phases in the procedure: the section was concerned not just with the exchange of writings, but also with the time when that exchange took place. The claims, allegations and evidence referred to in paragraph 37, for example, were phases or sequences of acts in the procedure. He could go along with changing the word "timing" on condition that the concept of time and of distinct phases in the procedure was retained.

43. **Mr. HOLTZMANN** (United States of America) pointed out that the paragraphs on written submissions included nothing about post-hearing submissions. The parties themselves might have different expectations as to whether such post-hearing submissions would be permitted or not and might come from countries with very different practices in the matter. He therefore suggested the inclusion of a paragraph 39*bis* that would point out the existence of such differences in expectations and practices and draw attention to how useful it might be for arbitral tribunals to ask the various parties whether they expected post-hearing submissions to be allowed. In some cases, the desirability of post-hearing submissions would not be known until a later stage in the proceedings. Consequently, an early decision on the subject would not always be appropriate. Moreover, if such a decision were made at an early stage in the proceedings, it should be open to subsequent revision in the light of developments.

44. **Mr. ABASCAL ZAMORA** (Mexico) expressed his agreement with the representative of the United States regarding the insertion of a paragraph 39*bis*. It was quite common for the parties to have different expectations regarding the possibility of making submissions after the hearings had taken place.

45. **The CHAIRMAN** said that the Secretariat would include a provision along those lines.

**Section 10**

46. **Mr. GRIFFITH** (Australia) said that the title of section 10 appeared to suggest a change in style. In his view, it might be preferable to delete the words in brackets. As for the examples given, he suggested that they include a reference to the storage of documents.

47. **Mr. SEKOLEC** (Secretariat) said that titles would not normally be drafted in such detail, but that in the present case it had been thought that the title could serve as a useful check-list and give an indication of the kind of topics that arbitrators should bear in mind. The Secretariat would in any case review all titles after the present discussion by the Commission.

48. **Mr. GRIFFITH** (Australia) welcomed the idea of a review of the titles, which should be designed to make the check-list easier to use.

49. **Mr. FOUCHARD** (France) expressed his agreement with the representative of Australia. In his view, paragraph 40 was alarming in its excess of details. It could lead the arbitrator to oblige the parties to concern themselves with minor formalities that were irrelevant to their dispute, while overlooking the most important aspect, namely, respect for the equality principle and the right of defence. Forcing inexperienced arbitrators to impose such rules might lead to violations of the right of defence when a party, for material reasons, could not meet the requirements laid down. It might be useful to make such arrangements in some arbitrations, but, that did not in any way make them suitable for all.

50. **Mr. ABASCAL ZAMORA** (Mexico) said that paragraph 40 was too complex, too detailed and too regulatory. If it were retained, it should be simplified and couched in more general terms.

51. **Mr. MELIS** (Observer for the International Council for Commercial Arbitration) disagreed with the representative of Mexico, because arbitrators, especially non-professional ones, needed guidance. He was happy with paragraph 40 as it stood, since it dealt with a real problem, namely, that of finding a satisfactory way of organizing the documents. Indeed, he thought that the list of items could be expanded. For instance, arbitrators might need to decide the language or languages of submissions and, once the languages were agreed, whether annexes would be permitted in other languages. In regard to translations, it might be necessary to distinguish between documents requiring official translations and other documents where an ordinary translation would suffice.

52. **Mr. HOLTZMANN** (United States of America) agreed with the previous speaker. Such detailed advice would help the rights of the defence by making it easier for the arbitrator to find the documents concerned. Regarding the other complaint by the representative of France, he said he would have no objection to including the phrase "in some cases" after the words "it may be helpful" in the *chapeau* to paragraph 40 so as to make the text less comprehensive than it was at present. Concerning the observations on languages made by the previous speaker, he was under the impression that the subject had already been covered during the discussion of paragraphs 17 to 19.

53. **Mr. CHOUKRI SBAI** (Observer for Morocco) said that paragraph 40 was by no means binding and that the suggestions it made might indeed be helpful. Some arbitrations involved a great many documents, which might be submitted at different moments in time. The organization of such materials could be beneficial to the arbitration proceedings. He therefore agreed with the observer for the International Council for Commercial Arbitration that the paragraph should be retained.

*The meeting was suspended at 11.20 a.m. and resumed at 11.50 a.m.*

**Section 11**

54. **Mr. ABASCAL ZAMORA** (Mexico) referred to paragraph 43, which mentioned the possibility that the tribunal might decide to make awards in a specific order. He would urge caution: arbitrators might be well advised not to commit themselves prematurely to rendering judgements in a specific order, since that might in the end complicate the procedure and take up too much time. It would be preferable for arbitrators to retain their freedom: it was one thing to say that they could render awards in a particular order and another to say that they should.

55. **Mr. FOUCHARD** (France) agreed with the representative of Mexico. It might be dangerous to establish the possibility of making partial awards and lay down an order in advance. It might also be dangerous to draw up a list of the points at issue in all cases. At the time when the list was drawn up, the parties might not always be aware of all aspects of the case and all possible developments. Such a list might prevent the arbitrator from dealing with additional subjects that arose in the course of the proceedings. That could create many difficulties, and a number of arbitral institutions had been reluctant to take that path. The terms of the dispute should not be frozen at the outset.

56. **Mr. HOLTZMANN** (United States of America) agreed with the representative of France that paragraph 41 could be usefully modified to make it clear that any list of the points at issue, whenever it was prepared, might be subject to revision as the case developed. He pointed out that the UNCITRAL Rules

*(Mr. Holtzmann, United States of America)*

required the points at issue to be stated at the earliest stage. However, there should be no attempt to exclude arbitration rules that might limit the possibility of changing the points at issue as the case proceeded. He was in favour of the French suggestion that paragraph 41 be made more flexible. It might be useful to state, at the end of the paragraph, that the terms of reference required under certain arbitration rules served the same purpose as the list suggested in paragraph 41.

57. **Mr. SZURSKI** (Poland) agreed with the previous three speakers. He drew attention to the third sentence of paragraph 43 and pointed out that the terms "partial" or "interim" could not be used to describe decisions, but only awards. Moreover, some legislations did not provide for the possibility of awards of such a nature.

58. **Mrs. GREINER** (Observer for Switzerland) said that although she would prefer to delete the whole of section 11, she realized that that might not have majority support. She therefore suggested that the section be redrafted in a more balanced form to take account of the points raised by the representatives of France, Mexico and Poland.

59. **The CHAIRMAN** requested the Secretariat to revise section 11 to take account of the comments made.

60. **Mr. HOLTZMANN** (United States of America) said that he hoped that in redrafting section 11 the Secretariat would also consider giving in flexible terms a definition of the relief or remedy sought by the parties. Under article 18 of the UNCITRAL Arbitration Rules, that definition had to be included in the statement of claim, and such a definition had in fact been included in the previous version of the text under discussion without objection.

61. **Mr. SEKOLEC** (Secretariat) confirmed that the earlier version had indeed included a paragraph to the effect that there existed different practices as to the level of detail of the relief or remedy sought by parties. However, the Secretariat had felt that that touched upon the substance of the matters in dispute and thus went beyond the organizational matters with which the draft Notes were concerned. It had therefore deleted the paragraph, but could of course prepare a draft text for the next review of the Notes by the Commission the following year.

**Section 12**

62. **The CHAIRMAN** noted that there were no comments on section 12.

**Section 13**

63. **Mr. LEBEDEV** (Russian Federation) suggested that in paragraph 45 it might be useful to indicate, in accordance with article 27 of the Model Law on Arbitration, that the arbitrators could at that stage clarify the intention of the parties to request assistance from a court in taking evidence. That might well be inferred from the present drafting, but it should be spelt out.

64. *Moreover, in paragraph 47 some redrafting might be needed, at least in the Russian version, to make* it clear that the absence of a protest was not proof of a document having been received.

65. **Mr. ABASCAL ZAMORA** (Mexico) suggested that paragraph 49 should contain a reference to the various electronic means of transmitting documents listed in paragraph 36.

66. Paragraph 50 referred to the possibility of one party having to transmit certain documents to the other, reflecting the practice of "discovery" used in common law countries. Mention should also be made of the analogous but different practices used in other legal systems whereby on-the-spot inspections of documents within the control of one party could be made.

67. **Mr. FOUCHARD** (France) congratulated the Secretariat for having streamlined the text, but considered that even more could be done in that direction. Paragraphs 45 and 46 were very useful, but practically all of the rest of the section might be deleted. Paragraphs 47 to 49 gave over-detailed and not particularly useful advice, and paragraphs 50 to 54 were downright dangerous. He agreed with the Mexican representative that those paragraphs introduced into the arbitration procedure a watered-down version of the common-law procedure of "discovery", little used in civil law countries. It was not for UNCITRAL to recommend one evidential system rather than another — a system moreover which the United States and the United Kingdom delegations were not trying to impose in international arbitration because of the difficulties and expense involved. True, the system was optional, but it was very complex. Moreover, paragraph 51 was worded in such an abstract manner as to be incomprehensible. He therefore suggested that only paragraphs 45 and 46 and the last sentence of paragraph 54 should be retained.

68. **Mr. OLIVENCIA** (Spain) agreed with the views on the "discovery" system expressed by the representatives of France and Mexico. Since the Notes referred to peremptory norms of arbitral law procedures, they might have the force of public policy for parties to arbitration. The issue must therefore be dealt with very sensitively: any ambiguity in the text might introduce a practice completely foreign to certain legal systems, thus affecting the arbitration procedure itself.

69. **Mr. SZURSKI** (Poland) endorsed the views of the French representative.

70. **Mr. HOLTZMANN** (United States of America) said that paragraphs 50 to 54 did not reflect the common-law system with regard to documentary evidence and would read quite differently if they did. The Secretariat should be congratulated on producing a carefully-worded text.

71. In his view, paragraphs 45 to 49 were useful. He could probably accept the drafting amendments to paragraph 47 suggested by the representative of the Russian Federation. He would also prefer to retain paragraphs 50 to 53 in the Secretariat's more complete formulation, but could accept a shorter definition on the lines of article 24 (3) of the UNCITRAL Arbitration Rules and paragraph 54 of the present draft.

72. With regard to the issue of the powers of an arbitral tribunal to order a party to disclose an internal document, the UNCITRAL Arbitration Rules provided for such powers and there was no limitation on the kind of evidence an arbitral tribunal might request. However, since the wording of the last phrase of paragraph 52 might imply that the arbitral tribunal did not have such powers, it should be redrafted if the paragraph was to be retained.

*The meeting rose at 12.35 p.m.*

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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-eighth session

SUMMARY RECORD (PARTIAL)* OF THE 576th MEETING

Held at the Vienna International Centre, Vienna,
on Monday, 22 May 1995, at 2 p.m.

**Chairman**: Mr. GOH (Singapore)

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International commercial arbitration: draft Notes on Organizing Arbitral Proceedings (*continued*)

Section 13 (*continued*)
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Section 2 (*continued*)
General observation

* No summary record was prepared for the rest of the meeting.

This record is subject to correction.

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Distr.: 27 November 1995

*The meeting was called to order at 2.10 p.m.*

**INTERNATIONAL COMMERCIAL ARBITRATION: DRAFT NOTES ON ORGANIZING ARBITRAL PROCEEDINGS** (*continued*) (A/CN.9/396 and Add.1, A/CN.9/410)

**Section 13** (*continued*)

1. **Mr. ABASCAL ZAMORA** (Mexico), referring to the statement he had made at the previous meeting, explained that his idea was not that the paragraphs on documentary evidence should exclude wording which reflected the common law principle of discovery, but that they should include some reference to the civil law tradition on the subject as well. By that, he meant the tradition as it related to arbitration proceedings, not to civil procedure as such. Mexico's arbitration rules, for example, gave arbitrators discretion to deal with evidential matters flexibly, thus allowing room for meeting the differing expectations of the two sides in international proceedings which involved parties from countries with dissimilar legal traditions. That flexibility was what the text should seek to promote.

2. **Mr. HOLTZMANN** (United States of America), referring to the comments made by the representative of France on paragraphs 47-53, said that his own delegation drew a distinction between paragraphs 47-49, which dealt with mechanical matters and whose general content it approved, and paragraphs 50-54, which related to production of documents. While his delegation would prefer paragraphs 50-53, as well as paragraph 54, to remain more or less as they stood, it could also accept a text based on article 24 (3) of the UNCITRAL Rules and the present paragraph 54.

3. **Mr. FOUCHARD** (France) suggested, as a compromise, the deletion of paragraphs 50-53 and their replacement by a text based on article 24 (3) of the UNCITRAL Rules.

4. **The CHAIRMAN** said that, if he heard no objection, he would take it that the Commission accepted the suggestion just made by the representative of France.

5. *It was so agreed.*

**Section 14**

6. **The CHAIRMAN** noted that there were no comments on section 14.

**Section 15**

7. **Mr. HOLTZMANN** (United States of America) proposed the deletion of paragraph 63 because of the threat it posed to the enforceability of awards. Since it was a basic principle of justice that witnesses should be heard, where an arbitral tribunal refused to hear a witness for lack of the requisite notice, that refusal might, under some legal systems, render the resulting award unenforceable.

8. **Mr. FOUCHARD** (France) agreed. He had even more concern about paragraphs 60-62, because they expressed a clear preference for a situation in which discussions would take place before the hearing between witnesses and the lawyers acting for the party presenting the witnesses — in other words, a situation in which the witnesses would be "prepared" for the hearing. That was contrary to civil law practice. He could accept paragraph 60, since it was reasonable for the tribunal to have advance notice of details such as the witnesses' names and addresses, but paragraphs 61-63 should be deleted.

9. **Mr. SZURSKI** (Poland) endorsed the comments made by the French representative. Arbitrators should not be encouraged to require the parties to provide witness statements in advance, because inevitably the statements would be prepared by the parties' lawyers and merely signed by the witnesses. At the same time, the practice of advance submission of statements should not be ruled out altogether. He therefore suggested that paragraphs 61 and 62 should be redrafted so as to remove the emphasis in favour of advance submission and that paragraph 63 should be deleted.

10. **Mr. MELIS** (Observer for the International Council for Commercial Arbitration) said it was true that, from the civil law point of view, the matter of witness requirements in the prehearing stage was covered adequately by paragraph 60, but paragraphs 61 and 62 reflected a different approach. He recommended their retention in order that the text should cater for the many international arbitrations in which parties and their counsel came from countries with differing legal systems.

11. He agreed with the United States representative about the risk inherent in paragraph 63. It should either be deleted, or be modified to express the idea that the tribunal's right to refuse to hear a witness was limited to the situation in which the witness failed to appear, in which case the tribunal would not allow the witness to be called at a second hearing.

12. **Mr. HOLTZMANN** (United States of America) endorsed the observations made by the previous speaker with regard to paragraphs 60-62. Paragraphs 61 and 62 reflected an established practice in many international commercial arbitrations and one which was recommended in the International Bar Association's supplementary rules dated 28 May 1983 governing the presentation and reception of evidence in such arbitrations. In commenting on those two paragraphs, the French representative had alluded to the issue of witness interviews at the prehearing stage. That was dealt with in paragraph 68, which he approved as it stood.

13. With regard to paragraph 63, he had already drawn attention to the danger it represented. The alternative wording suggested by the previous speaker might share that defect.

14. **Mr. LEBEDEV** (Russian Federation) said that the content of section 15 was useful in drawing attention to issues which might arise in the course of the arbitration. However, the text should avoid giving the impression — which he believed it might on a strict reading — that where arbitrators required the parties to submit full signed witness statements before the hearing, failure to meet that requirement would preclude a witness from giving oral evidence at the hearing itself. Furthermore, the submission of a full written statement should depend on the wish of the arbitrators, not on the wish or consent of the party concerned.

15. **Mrs. GREINER** (Observer for Switzerland) said that she could accept the French suggestion to delete paragraphs 61 and 62. However, a compromise solution, which might meet the wishes of both the French and the United States delegations in regard to the text on witness requirements in the prehearing stage, and ensure a certain balance, might be to add a sentence making it clear that, in addition to the practice reflected in those paragraphs, there was another equally common practice.

16. **Mr. CHOUKRI SBAI** (Observer for Morocco) said that his country's legal system allowed only for oral testimony in the presence of the parties, lawyers and so on. Either paragraphs 61 and 62 should be deleted or paragraph 61 should be amended to say that parties "might agree" to allow summaries of the statements of witnesses or full signed statements to be submitted.

17. **Mr. FOUCHARD** (France) agreed that the problem might be solved by redrafting as suggested by Switzerland; however, the passage could not remain as it stood. As paragraph 68 said, the preparation of witnesses was considered improper in some legal systems. To obtain statements from them in advance also seemed inadvisable. Witnesses were often employees and would anyway tend to depict circumstances in a certain light. They should testify freely without preparation so that the tribunal could assess their sincerity; otherwise their testimony would be of little value. Paragraphs 61 and 62 should be redrafted and it should be stated that the preparation of the full text of witnesses' statements in advance was not the only possible practice and was not always either legal or advisable.

18. **The CHAIRMAN** said he took it that the Commission was ready to leave the Secretariat to redraft the passage along the lines suggested by Switzerland.

19. **Mr. ABASCAL ZAMORA** (Mexico) asked what would be the consequence if a party did not submit witnesses' statements in advance. Would it mean that the witnesses would not be heard? That might lead to problems in enforcing an award where a party's witness had not been heard because a statement had not been submitted in advance, perhaps because that practice was illegal or not usual in the party's country, and it might plead that it had consequently not had a fair hearing.

20. **The CHAIRMAN** said he was not quite sure what would happen. However, in Singapore, as far as court proceedings were concerned, written testimony was now taken and the witnesses were cross-examined on the basis of that testimony. The new system was generally welcomed.

21. **Mr. ABASCAL ZAMORA** (Mexico) said that he was not criticizing the system but merely pointing out that the present text was not clear.

22. **Mr. HOLTZMANN** (United States of America) said that it was illegal everywhere for a lawyer to "suborn perjury" but that he doubted whether it was illegal anywhere for an arbitrator or a lawyer to tell a witness to write out beforehand what he would say in court.

**Section 16**

23. **The CHAIRMAN** noted that there were no comments on the section.

**Sections 17 and 18**

24. **Mr. FOUCHARD** (France) said that the question of multi-party arbitration was of great complexity and that attempts to solve the problem had either failed or led to ineffective measures. He suggested that section 18 be deleted.

25. **Mr. SZURSKI** (Poland) suggested that a phrase be added at the end of paragraph 83 in section 17 referring to the possibility that statements might be written down by a qualified secretary present at the hearing and read through afterwards if requested by the parties to ensure that they had been recorded correctly.

26. Section 18 as its stood did not reflect existing practice in international commercial arbitration. Attention should be drawn to the possibility that parties might call in other parties, sometimes referred to as "interpleaders".

27. **The CHAIRMAN**, after inviting delegations to indicate their attitude to the Polish suggestion to add a new sentence to paragraph 83, noted that there was no objection to it.

28. **Mr. MELIS** (Observer for the International Council for Commercial Arbitration) suggested that paragraphs 87 and 88 should be deleted as being outside the topic of organizing arbitral proceedings.

29. **The CHAIRMAN**, after inviting delegations to indicate their attitude, noted that there was no objection to the deletion of paragraphs 87 and 88.

30. **Mr. FOUCHARD** (France) suggested that paragraphs 89 and 90 should also be deleted.

*The discussion covered in the summary record was suspended at 3.10 p.m. and resumed at 3.40 p.m.*

31. **Mrs. GREINER** (Observer for Switzerland) supported the suggestion to delete paragraphs 89 and 90.

32. **Mr. RENGER** (Germany) said his delegation would be very reluctant to accept that suggestion. It believed that paragraphs 89 and 90 deserved inclusion.

33. **Mr. GRIFFITH** (Australia) suggested that the Secretary of the Commission be asked for his advice on the suggestion.

34. **Ms. BUURE-HÄGGLUND** (Finland) said her delegation would have some hesitation over deleting the whole section on multi-party arbitration. There should at least be a mention in the Notes that the possibility of such arbitration existed, although she would not oppose deletion of the detailed advice set out in paragraphs 89 and 90.

35. **The CHAIRMAN** wondered whether a paragraph might be included simply alerting the arbitrator to the possibility of multi-party arbitration.

36. **Mr. HERRMANN** (Secretary of the Commission) said he could envisage that some problems might arise in regard to paragraph 89, but not in regard to paragraph 90, which simply said that multi-party proceedings could be complicated and a number of factors ought to be taken into consideration when organizing them. Paragraph 90, perhaps with the addition of an introductory sentence, could either remain in its present position in the text or be inserted near the beginning, in the section dealing with the organization of arbitration proceedings. He himself would prefer the second alternative.

37. **Mr. FOUCHARD** (France) agreed that paragraph 90 posed no dangers. He endorsed the Secretary's view that mention should be made of the problems that could arise in multi-party arbitration, and that that was best done earlier in the Notes. It would be sufficient to state that, where more than two parties were involved, certain problems could arise, and that accordingly even more care should be taken in deciding certain matters.

38. **CHOUKRI SBAI** (Observer for Morocco) said that paragraph 90 was unnecessary, since it contained nothing new, and merely listed the same problems as could arise in an arbitration involving only two parties. All the existing paragraphs relating to multi-party arbitration should either be redrafted or deleted altogether.

39. **Mr. SZURSKI** (Poland) found the solution suggested by the Secretary very reasonable. The paragraph proposed could perhaps take the place of the existing paragraph 87.

**Section 19**

40. **Mr. SZURSKI** (Poland) proposed that paragraph 92 be deleted, since it was obvious that registration would be carried out by the winner in the dispute as the party with an interest in the enforcement of the award.

41. **Mr. HOLTZMANN** (United States of America) said he could not support that proposal because in practice it might be difficult to know which party was the winner: there might be subsequent counter-claims, or the party granted the award might not be satisfied with it. Some laws in fact required the arbitration tribunal to file the award. The wording of paragraph 92 was broad enough to cover all those possibilities, and he urged that it be retained.

42. **Mrs. GREINER** (Observer for Switzerland) said she had some difficulty in understanding the need for section 19, which in her view had nothing to do with organizing an arbitration.

43. **Mr. HERRMANN** (Secretary of the Commission) reminded the Commission that an award did not always signal the end of arbitration proceedings, because partial or interim awards might well be made. Section 19 had been included since it dealt with one of the organizational issues that might have to be addressed by an arbitral tribunal.

44. **The CHAIRMAN**, after inviting delegations to indicate their attitude to the proposal to delete paragraph 92, noted that there was a majority in favour of retaining the paragraph.

*The meeting was suspended at 4 p.m. and resumed at 4.30 p.m.*

**Section 2** (*continued*)

45. **Mr. GRIFFITH** (Australia) said that one point had been passed over in connection with paragraph 15 in section 2. Recalling the discussion that had taken place at the 574th meeting, he proposed that, to guard against any misunderstanding and avoid giving any impression that UNCITRAL was hostile to arbitration institutions, the phrase "(e.g., the UNCITRAL Arbitration Rules or another set of rules)" in the first sentence should be deleted, and the following text inserted after the second sentence: "The UNCITRAL Arbitration Rules may readily be applied. Alternatively, the parties may wish to adopt the rules of an arbitration institution. In this case, it would be necessary to ascertain and stipulate terms under which the arbitration could proceed as an administered arbitration".

46. **Mr. MELIS** (Observer for International Council for Commercial Arbitration) supported that amendment.

47. **Mr. LEBEDEV** (Russian Federation) said that he found it difficult to conceive of a situation in which parties would agree to ad hoc arbitration proceedings without any arbitration rules. In such a case, the proceedings would be subject to the law of the State in which they took place. Under the amendment proposed by the representative of Australia, however, the parties, at the arbitrator's suggestion, would agree to subordinate the proceedings to institutional arbitration rules with all associated forms of control. That would amount to a radical change in the nature of the proceedings and also in the original content and purpose of the paragraph.

48. **Mr. SZURSKI** (Poland) said that he understood the misgivings of the representative of the Russian Federation. He suggested that the second sentence should be amended along the following lines: "In such a case, they may (a) accept regularly applicable UNCITRAL Arbitration Rules or (b) adopt the rules of an administered arbitration institution". The last sentence would be deleted.

49. **Mr. GRIFFITH** (Australia) said that the amendment suggested by the representative of Poland placed more emphasis on the second option than had been intended. The UNCITRAL Arbitration Rules should be given first choice. The second option gave rise to technical difficulties: the institution would have to be consulted, its rules would have to be adapted and there might have to be a waiver of rules that had not been complied with to date.

50. **Mr. ABASCAL ZAMORA** (Mexico) said that if an arbitral tribunal had been set up without an agreement on arbitration rules, there would inevitably be an ad hoc arbitration. The UNCITRAL Arbitration Rules were the only universally recognized rules applicable in such cases. Any attempt to apply the rules of an arbitration institution to the proceedings of a tribunal that was already operating would raise serious problems and could not therefore be recommended as an equally valid alternative.

51. **Mr. CHOUKRI SBAI** (Observer for Morocco) thought that the Polish text, setting out two alternatives, might restrict the freedom of the parties.

52. **Mr. LEBEDEV** (Russian Federation) said that a proposal by arbitrators in favour of institutional arbitration might prove unacceptable and indeed illegal inasmuch as such a proposal would run counter to the institutional arbitration rules concerned. To opt for an institution in spite of its rules would be quite unacceptable.

53. **Mr. HERRMANN** (Secretary of the Commission) said that the original intention of paragraph 15 had not been to take a stand in favour of ad hoc proceedings or of proceedings based on institutional arbitration rules. The idea was that it might be useful to draw inspiration from certain rules in addressing some of the procedural issues that arose in the conduct of proceedings. The paragraph could perhaps be redrafted to suggest that consideration might be given to agreeing on rules governing the conduct of proceedings, as contained, for example, in section III of the UNCITRAL Arbitration Rules, entitled "Arbitral proceedings".

**General observation**

54. **Mr. ABASCAL ZAMORA** (Mexico) said that, after reviewing the whole draft, he would like to suggest that an emphatic statement should be inserted, perhaps at the beginning of the Notes, urging prospective users to exercise caution and to refrain from seeking the answer to all questions in the document.

55. **The CHAIRMAN** said that the Secretariat would be asked to take care of that point, perhaps under paragraph 9 or 10.

*The meeting rose at 5.05 p.m.*

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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-eighth session

SUMMARY RECORD (PARTIAL)* OF THE 577th MEETING

Held at the Vienna International Centre, Vienna,
on Tuesday, 23 May 1995, at 9.30 a.m.

**Chairman**: Mr. GOH (Singapore)

CONTENTS

International commercial arbitration: draft Notes on Organizing Arbitral Proceedings (*continued*)

Section 2 (*continued*)

* No summary record was prepared for the rest of the meeting.

This record is subject to correction.

Corrections should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent *within one week of the date of distribution of this document* to the Secretary of the Commission, room E0455, Vienna International Centre.

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V.95 59152 (E) (a:\1995\uncitral 2)

Distr.: 27 November 1995

*The meeting was called to order at 9.50 a.m.*

**INTERNATIONAL COMMERCIAL ARBITRATION: DRAFT NOTES ON ORGANIZING ARBITRAL MEETINGS** *(continued)* (A/CN.9/410)

**Section 2** (*continued*)

1. **The CHAIRMAN** asked whether a compromise solution had been found to the drafting of Section 2 (paragraph 15) of the draft Notes (A/CN.9/410).

2. **Mr. HOLTZMANN** (United States of America) submitted a joint proposal on behalf of the delegations of Australia, the Russian Federation and the United States of America to reword paragraph 15 as follows:

> "15. Sometimes parties who have not included in their arbitration agreement a stipulation that a set of arbitration rules will govern the arbitral proceedings might wish to do so after the arbitration has begun. If that occurs, the UNCITRAL Arbitration Rules may be used without modification. In the alternative, the parties may wish to adopt the rules of an arbitration institution. In that case, it would be necessary to secure the agreement of that institution and to stipulate the terms under which the arbitration could be carried out in accordance with the institution's rules. However, caution is advised, as consideration of a set of arbitration rules might delay the proceedings, or give rise to unnecessary controversy."

The Secretariat might undertake any minor drafting changes needed.

3. **Mr. GRIFFITH** (Australia) said that in any commentary it should be noted that great care ought to be taken in adopting institutional rules.

4. **Ms. BRELIER** (France) considered that the proposed new wording was rather imprecise, very long and uncertain in its implications. Her delegation wished it to be made clear that the adoption of arbitration rules was not a prior condition for arbitration.

5. **The CHAIRMAN** said that the joint proposal did not change, but merely clarified and elaborated the meaning of the present paragraph 15.

6. **Mr. CHOUKRI SBAI** (Observer for Morocco) asked the United States representative to explain why the agreement of an arbitration institution was necessary when the parties freely chose to adopt the rules of that institution. If the institution's agreement were delayed, the arbitration process would be adversely affected.

7. **Mr. OLIVENCIA** (Spain), observing that it would have been better for the proposal to be submitted in writing, proposed that the words "without modification" should be deleted from the reference to the UNCITRAL Arbitration Rules, since the Rules themselves stated that they could be used with amendments agreed by the parties.

8. On the point raised by the observer for Morocco, he said that for a full conversion to administered arbitration the agreement of the arbitration institution would be needed, but if the parties simply referred to the rules of an institution that would not be necessary. Mere reference to such rules would not convert the arbitration into an administered arbitration.

*(Mr. Olivencia, Spain)*

9. His delegation was not in entire agreement with the proposed new wording, but in any case the Notes were practical suggestions and were not binding. They must, however, be quite clear and not result in any misunderstanding for the parties.

10. **Ms. ZHANG Yuejiao** (China) thought that the new text would affect the freedom of parties to sign an agreement. She agreed that the UNCITRAL Arbitration Rules allowed parties discretion in selecting their arbitral procedure. Since the UNCITRAL Rules applied to international arbitration, and the Notes applied to both international and domestic arbitration, it should be made clear that the parties to international arbitration could choose the UNCITRAL Rules. Parties were not obliged to choose the rules of an arbitration institution or the UNCITRAL Rules, but could also adopt ad hoc rules. She therefore considered that the second part of the proposed new wording could be simplified and amended to read: "Without prior decision on the procedural rules, undue delay in the procedure might result."

11. **Mr. HOLTZMANN** (United States of America) suggested that the words "without modification" might be changed to "with or without modifications" to take account of the objections raised.

12. Replying to the question from the observer for Morocco as to the need for agreement by an arbitration institution, he explained that the rules of such institutions generally provided for a function to be performed by the institution, which might be unwilling to perform that function in a case that had already begun unless it was paid a fee. Hence it might require an agreement. The proposed wording was designed to alert parties to that possibility.

13. **Mr. CHOUKRI SBAI** (Observer for Morocco) said that in view of that explanation he could support the joint proposal. He endorsed the Spanish proposal to delete the words "without modification".

14. **Mr. ABASCAL ZAMORA** (Mexico) also endorsed the joint proposal, subject to minor drafting changes by the Secretariat, and the Spanish proposal to delete the words "without modification".

15. **The CHAIRMAN** suggested that the joint proposal be accepted with the deletion of the words "without modification" and subject to minor drafting changes by the Secretariat. A final version of the text would be submitted to the Commission at its next annual session.

16. *It was so agreed.*

*The discussion covered in the summary record ended at 10.20 a.m.*

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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-eighth session

# SUMMARY RECORD (PARTIAL)* OF THE 578th MEETING

Held at the Vienna International Centre, Vienna,
on Tuesday, 23 May 1995, at 2 p.m.

**CHAIRMAN:** Mr. GOH (Singapore)

CONTENTS

Electronic data interchange: draft Model Law (*continued*)

Report of the drafting group

* No summary record was prepared for the rest of the meeting.

This record is subject to correction.

Corrections should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent *within one week of the date of distribution of this document* to the Secretary of the Commission, room E0455, Vienna International Centre.

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V.95 59158 (E) (a:\1995\uncitral 2)

Distr.: 27 November 1995

*The meeting was called to order at 2.15 p.m.*

*The discussion covered in the summary record began at 4.50 p.m.*

**ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW** (*continued*)

**Report of the drafting group** (A/CN.9/XXVIII/CRP.5 and Add.2)

1. **The CHAIRMAN** said that he would invite Ms. Clift (Australia) to introduce the report.

2. **Ms. CLIFT** (Australia) said that, in document A/CN.9/XXVIII/CRP.5, the change made to article 1 reflected the Commission's decision to have a more general provision covering sphere of application, with a footnote. Two alternative texts were suggested in the footnote, because the drafting group had found it difficult to decide whether a limiting phrase or a more inclusive phrase was needed. The only change made to article 3 had been to replace "source" by "origin", which seemed better in most languages. No change had been made to articles 4, 5 or 6. In article 7, paragraph (1), the words "or retained" had been added after "presented", and the order of the two subparagraphs had been reversed. Subparagraph (a) now only required assurance as to the integrity of the information from the time of generation. In subparagraph (b) the words "where it is required that information be presented" had been added at the beginning of the sentence, and the words "capable of being" added before "displayed". In paragraph (2) (b) the word "composed" had been replaced by "generated". In the title of article 8, the word "value" had been replaced by "weight". Paragraph (3) of the article had been deleted. The *chapeau* of paragraph (1) now referred to the "admissibility" of a data message, and in subparagraph (a) the word "sole" had been inserted before "ground".

3. The redrafted versions of articles 9, 10 and 11 were contained in document A/CN.9/XXVIII/CRP.5/Add.2 (which superseded A/CN.9/XXVIII/CRP.5/Add.1). Changes had been underlined. Paragraph (1) of article 9 had been changed in order to align the text with previous articles, and the other changes in articles 9 and 10 reflected decisions of the Commission. She wished to suggest in addition that, in paragraph (2) of article 9, the words "retain information" should be replaced by "retain documents, records or information", in line with the wording used at the beginning of the article. Changes made to article 11 reflected the Commission's decision to adopt the substance of the proposal put forward by Australia, the United Kingdom and the United States of America (A/CN.9/XXVIII/CRP.7), as amended. In paragraphs (4) (b), (5) and (6), the drafting group had preferred the phrase "knew or should have known" to "knows or would know", and in paragraph (4) (a) the words "notice within a reasonable time" had been substituted for "reasonable notice".

4. **Mr. ABASCAL ZAMORA** (Mexico) said he had no objection to the report, but pointed out that those representatives who were experts on electronic data interchange and who had taken part in discussions on the text were no longer present. When those representatives came to read the report, they might not find the proposed text acceptable: some, for instance, had objected to the word "activities" that now appeared in article 1. He was not sure whether it was right for representatives who had not participated in the original discussions to take the final decision on the text, and therefore proposed that the Commission should simply take note of the report, and that its adoption should be deferred to the Commission's next session.

5. **The CHAIRMAN** said that, at the Commission's next session in New York, the same experts would not necessarily be attending as members of the delegations of their respective countries. The Commission could, of course, decide at that session to make further changes to the text, but he urged that the drafting group's report should be adopted at the current session so as to set out what had been accomplished.

6. **Mr. BURMAN** (United States of America) said that in general the drafting group had done good work in reflecting the Commission's decisions. Before the report was adopted, however, he would suggest that the wording proposed for article 10 (2) be reconsidered. The point was that parties might have rights under other law to modify certain aspects of chapter II, not that parties had the right to modify a rule of law. It might be preferable to substitute the word "matters" for "rule of law".

*The meeting rose at 5.05 p.m.*

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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-eighth session

SUMMARY RECORD (PARTIAL)* OF THE 579th MEETING

Held at the Vienna International Centre, Vienna,
on Wednesday, 24 May 1995, at 9.30 a.m.

**Chairman**: Mr. GOH (Singapore)

CONTENTS

Electronic data interchange: draft Model Law (*continued*)

Report of the drafting group (*continued*)

* No summary record was prepared for the rest of the meeting.

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*The meeting was called to order at 9.40 a.m.*

**ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW** (*continued*)

**Report of the drafting group** (*continued*) (A/CN.9/XXVIII/CRP.5 and Add.1 and 2)

1. **Mr. BURMAN** (United States of America) said that his delegation withdrew the comments it had made at the previous meeting casting doubt on the language used in the report of the drafting group concerning article 10, paragraph (2). After verification, it was clear that the wording it had chosen was correct. The United States of America still had reservations as to the appropriateness of the language, but would take up that issue at the next session.

2. **Mr. SORIEUL** (Secretariat), referring to the suggestion made at the previous meeting that it might not be possible to adopt the drafting group's report and that all issues would have to be re-discussed in 1996, said that the drafting group had not sought to discuss substantive issues but simply to make sure that the Commission's decisions were reflected faithfully in the text. If the report of the drafting group, with any amendments that might be made, were not adopted, all the work done at the present session would have been wasted. It was important to adopt a text in order to provide a basis for discussion at the next session. The text submitted by the drafting group was, of course, not perfect and did not resolve all issues, but the Commission could if it so wished reopen the discussion at the next session, especially in regard to definitions.

3. **Mr. RENGER** (Germany) said that, following the clarification given by the Secretariat, he felt easier about the situation and able to accept the text as a basis for discussion at the next session. However, he strongly supported the views expressed by the representative of Mexico at the previous meeting. He did not question the work of the drafting group, but Germany could not agree that a final decision had been taken on the adoption of the text, because it had serious objections to article 11 and had put forward other proposals. Germany would not be able to accept the text if further discussion were excluded. It accepted the report of the drafting group as reflecting the discussions in the Commission, but reserved its right to reopen discussion on substantive issues at the next session.

4. **Mr. SORIEUL** (Secretariat) said that there appeared to be two issues. Firstly, the Commission had to decide whether the report of the drafting group faithfully reflected the decisions taken by the Commission, since there could be no doubt that decisions had indeed been taken. The second question was to establish whether, at the next session, discussion could be reopened on an article or articles in the draft text. He pointed out, in regard to article 11, that certain parts of the text had been enclosed in square brackets. In other words, they had not been adopted and would therefore be discussed at the next session.

5. **The CHAIRMAN** pointed out that he had given an assurance that the issues could be re-discussed. He suggested that article 11 be adopted for the time being. In his view, a full discussion of article 11 would be necessary, since a number of delegations were unhappy with certain provisions.

6. **Mr. GRIFFITH** (Australia) said that the function of the drafting group was simply to express the decisions taken by the Commission. It had no right to decide matters of policy or substance. In his view, it had carried out its task faithfully and the proposed text should be adopted. In regard to the reopening of the discussion on certain issues that had been discussed at length in the Working Group, representatives were clearly entitled to do so if they wished. However, it was important to achieve a consensus that resulted in a text on EDI. Australia would be extremely concerned if no result were achieved at the twenty-ninth session. In that case, UNCITRAL would have to admit failure and vacate the field of EDI. He recognized the

(*Mr. Griffith, Australia*)

existence of problems in regard to article 11 and realized it would need to be re-discussed, especially after re-examination of the definitions in article 2. In his view, the reluctance of certain representatives to adopt the report arose from confusion between two separate issues, the report as a true reflection of what had been agreed by the Commission and the fact that certain countries had reservations in regard to certain questions which they would like to be re-discussed at the next session.

7. **Mr. SHIMIZU** (Japan) did not question the accuracy of the report by the drafting group and had no objection to its being adopted, but thought that article 11 (3) (a) (ii) should be in square brackets, since, in his recollection, the indicative vote taken on that subparagraph had been evenly divided.

8. **The CHAIRMAN** said that article 11 (3) (a) (ii) had been correctly retained following a decision by the Commission. He hoped that the lack of square brackets could be accepted on the understanding that the question would be re-discussed at the next session.

9. **Mr. ABASCAL ZAMORA** (Mexico) said that the proposal he had made at the previous meeting had not been intended to delay decisions or raise problems regarding the work of the drafting group. As he had stated at the previous meeting, representatives not in fact present at the meeting concerned might be unsure as to whether a text had been agreed or not. What he wanted was a clear indication as to whether the decisions taken by the Commission in regard to the drafting group's report would be binding at future sessions of the Commission. He wondered whether it would be possible to discuss in the future not only certain articles but the entire text submitted by the drafting group.

10. **The CHAIRMAN** emphasized that the present task of the Commission was to approve the report of the drafting group, and in so doing simply to make sure that the decisions taken by the Commission had been faithfully reflected in the text. It should not seek to reopen the discussion on policy. That could be done at the next session, since the Commission had not in fact adopted a model law at the present one.

11. **Mrs. BRELIER** (France) said that, after the explanation given by the Secretariat, she was willing to accept the report of the drafting group so long as it would be possible for the Commission to reopen the discussion at a future date.

12. She wished to suggest one minor amendment, namely, to replace the word "*initiateur*" in article 6 (1) (a) and elsewhere by the word "*expéditeur*", which was the only word that would be comprehensible in French.

13. **Mr. SORIEUL** (Secretariat) said that the proposed amendment would not affect the English version of the text.

14. **Ms. ZHANG Yuejiao** (China) said that the wording of article 10 (2) in the report of the drafting group was not the wording that she had understood the Commission to approve. The paragraph should be amended to read: "Paragraph (1) does not affect any right that may exist to modify by agreement any provision referred to in chapter II permitted by rule of law", or alternatively "Paragraph (1) does not affect any right that may exist to modify by agreement any rule of law which is not mandatory referred to in chapter II". The Commission had agreed that any mandatory rule of law in chapter II would not be affected.

(*Ms. Zhang Yuejiao, China*)

15. Article 11 (3) (a) (ii) should be put into square brackets, as previously agreed. As to how the result of the session should be reflected in the report, she suggested that the wording "The present text basically reflects the result of the discussion during the session" would allow some leeway for delegations to come up with new wording at the next session.

16. **Mr. HERRMANN** (Secretary of the Commission) said that the Secretariat had checked its notes on article 10 (2) and found that the wording in the drafting group's report did correspond to the wording suggested by the United Kingdom representative. The question of whether the provision could apply to a non-mandatory rule of law was one of substance, whereas the Commission was now adopting the report of the drafting group and merely had to check whether the group had implemented its decision faithfully.

17. **The CHAIRMAN** endorsed those views and pointed out that the Commission should not take over the functions of the drafting group. He urged delegations not to submit proposals of substance. According to his own notes, article 10 (2) had indeed been adopted.

18. **Mr. BURMAN** (United States of America) agreed with the Secretary, the Chairman and the representative of Australia. Any clarification of the language would have to be done at the next session. However, he hoped that the discussion on the whole text would not be reopened at the next session and that delegations would raise only those points on which they had reservations or strong differences of opinion.

19. **Mr. BONELL** (Italy) agreed in principle with the remarks of the representatives of Australia and the United States, but observed that each session of the Commission followed its own course. In any case, a number of delegations believed that not just the two pending articles, but the whole structure of the Model Law required further consideration, and many provisions were interlinked.

20. His delegation had full confidence that the Commission's proceedings had been properly recorded by the Secretariat and agreed that the present meeting was not the right place to reopen discussion on the matter of substance raised by the representative of China. That also applied to the point raised by the representative of France.

21. **Mr. CHOUKRI SBAI** (Observer for Morocco) suggested that the Commission should concentrate on the report of the drafting group. The Commission had not concluded its debate on the Model Law and would have a chance to discuss it again at its next session.

22. **Mr. CHAY** (Singapore) suggested that the Commission should decide expressly whether at the next session all the articles might be open for discussion both as to substance and drafting, or whether the discussion should be confined to certain articles. Leaving the matter open would pave the way to reopening the discussion on every single article.

23. Since a decision had been made to adopt articles 1, 3 to 9 and 12, with amendments faithfully reproduced by the drafting group, he suggested that at the next session the discussion on substance be restricted to articles 10 and 11, discussion on the other articles being confined to drafting matters.

24. **The CHAIRMAN** pointed out that it was not for the present session to tell the next session what it could or could not do. He himself shared the view of the German and United States representatives that some of the provisions of the Model Law were not very satisfactory and should be reviewed.

(*The Chairman*)

25. He invited the Commission to adopt the report of the drafting group, amended in the French version through the replacement of "*initiateur*" by "*expéditeur*".

26. **Mr. PELICHET** (Observer for the Hague Conference on Private International Law) said that the French proposal involved a question of substance. "*Expéditeur*" and "*initiateur*" were not at all the same in the context of electronic data interchange. He therefore proposed that the French version of the text should be maintained, even if that would mean reopening the discussion at the next session.

27. **Ms. ZHANG Yuejiao** (China) asked for confirmation that delegations would have a chance to discuss the points they wished at the next session.

28. **Mr. GRIFFITH** (Australia) reminded members of the Australian proposal that article 9 (2) be reworded as follows: "An obligation to retain documents, records or information ..." to make it conform with the wording in article 9 (1). That was a drafting point but one that had to be decided by the Commission.

29. **Mrs. BRELIER** (France) said that her amendment was not a matter of translation but of the correct use of the French language.

30. **Mr. CHOUKRI SBAI** (Observer for Morocco) considered that the word "*initiateur*" (originator), a new term relating to the creation, storage or transmission of a data message, was broader than "*expéditeur*" (sender).

31. **The CHAIRMAN** suggested that the text should remain as it stood, that the matter raised by the French representative should be discussed at the next session, and that the Australian proposal on article 9 (2) should be adopted.

32. *It was so agreed.*

33. *The report of the drafting group, as amended, was adopted.*

*The discussion covered in the summary record ended at 10.35 a.m.*